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No. _____

In The

Supreme Court of the United States

October Term, 1991

NICHOLAS KOSTELLO and GENE KOSTELLO,

Petitioners,

versus

THE STATE OF WASHINGTON,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the instructions given by the trial court in the criminal action deny petitioners due process of law and a fair trial as required by the Fourteenth Amendment of the United States Constitution?

II. Did the charging documents in their criminal case sufficiently inform the petitioners of the nature and cause of the accusations against them as required by the Sixth Amendment of the United States Constitution?

III. Did the failure of the trial court to properly instruct the jury that the "news media" had no more right to trespass on private property than any other person constitute a taking of property in violation of the Fifth and Fourteenth Amendments and violate the petitioners' right of privacy and of a fair trial as guaranteed by said amendments?

PARTIES

The parties to this case, as defined by Rule 12.4, are the petitioners Nicholas Kostello and Gene Kostello.

The respondent is the State of Washington.

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PETITION FOR A WRIT OF CERTIORARI

The petitioners Nicholas Kostello and Gene Kostello respectfully petition the Court for Writ of Certiorari to review the Washington Supreme Court's decision in this proceeding.

OPINIONS BELOW

The Opinion of the Court of Appeals of the State of Washington of October 31, 1991, is reproduced in Appendix A, App. 1, infra. The Order of the Supreme Court of the State of Washington denying review dated March 3, 1992, is reproduced in Appendix B, App. 15. The mandate

of the Washington State Court of Appeals dated April 29, 1992, is reproduced in Appendix C, App.16.

JURISDICTION

Nicholas Kostello and Gene Kostello, petitioners, seek a Writ of Certiorari to the Supreme Court of the State of Washington which denied review of a decision of the Washington State Court of Appeals, which decision was filed October 31, 1991. The court's jurisdiction to review the opinions of the Washington Supreme Court is invoked under 28 USC § 1257(3) and also under Rules of the Supreme Court Rule 10.1(b)(c).

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition for Certiorari is based upon the Fourteenth Amendment, the Sixth Amendment, and the Fifth Amendment, of the United States Constitution.

The Fourteenth Amendment Due Process clause provides in pertinent part:

> " . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . "

The Sixth Amendment provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;. . . . "

The Fifth Amendment provides in pertinent part:

" . . . [N]or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

RULE 14.1(h) STATEMENT

The issues involving the instructions given by the court was raised by the petitioners at the trial court level. See Transcript of the Trial Court pages 322 through 327 inclusive. Appendix D, App. 17, infra. These issues are also raised in a Motion for Arrest of Judgment and/or New Trial filed in the trial court level which was denied. Appendix E, App. 23, infra. Notice of Appeal to Superior Court. Appendix F, App. 26. Brief of Petitioners to the Court of Appeals on pages 19 through 33. Appendix G, App. 27, infra. Petition for Review to the Washington State Supreme Court on pages 11 through 25 inclusive. Appendix H, App. 44, infra.

The issue regarding the vagueness of the charging documents was raised in the trial court by a demand for a bill of particulars. Appendix I, App. 62, infra. Brief of the Petitioners to the Washington State Court of Appeals on page 35 of said brief. Appendix G, App. 43. Petition for Review to the Washington State Supreme Court on pages 2, 27, and 28. See Appendix H, App. 44, 60, 61.

The issue regarding the news media was raised before the trial court. See Transcript page 322 through 327 inclusive. Appendix D, App. 17, infra. Raised in the Motion for Arrest of Judgment and/or New Trial before the trial court. Appendix E, App. 23, infra. Notice of Appeal to the Superior Court. Appendix F, App. 26. Brief of the Petitioners to the Court of Appeals on pages 19 through 33. Appendix G, App. 27, infra. Petitioners' Petition for Review to the Washington State Supreme Court on pages 22 through 25 inclusive. Appendix H, App. 56-59 inclusive.

STATEMENT OF THE CASE

Petitioners were defendants in a Grays Harbor County District Court action where they were charged with gross misdemeanors. Each of them was charged with one count of Simple Assault and Two Counts of Coercion. See Appendix J, App. 64, infra.

A fire occurred on the petitioner's home premises, on December 17, 1985. The petitioners are brothers and reside at their home premises with their parents. The Kostello family had a smokehouse in back of their home which they used to cure and smoke meat. The smokehouse was not visible from the road, nor would it be visible to anybody unless they were given permission to come on the property or deliberately trespassed. The smokehouse caught on fire. Neither the petitioners or any other member of their family called the fire department, however they had no objection to the fire department

coming on their property for the purpose of extinguishing the fire, and understood that the fire department had that privilege.

During the time that the fire department was on petitioners' property, two news reporters, without the invitation of the petitioners, or any other member of their family, and without permission, trespassed on the petitioners' property and began taking photographs of the fire. The Kostello family did not want photographs taken of the fire, and told the news reporters to quit taking photographs and to leave their property.

The news reporters never asked permission to come on petitioners' property and take photographs even though the fire was seven hundred feet from the public road and not visible from the public road. This area could not be seen or entered without a trespass.

One of the news reporters, an employee of the Daily World, a newspaper of general circulation in Grays Harbor County, Washington, refused to surrender the film that he had taken while trespassing to the petitioners, refused to leave when requested, and continued taking photographs over the objections of the petitioners and their family.

Finally, this individual was escorted down the driveway for the purpose of having him leave the property when the petitioners' mother came out of the side door of her home and asked this individual to step into the house. He refused to do so and the petitioner Gene Kostello lifted him up on the step and the individual then walked into the house. This was the extent of the alleged assault and coercion. The purpose of Mrs. Kostello's

request, was to obtain the film, as she did not want the photographs published in the newspaper. No threats were made to this individual, but he was asked for the film. He was then told to get off the Kostellos' private property. Actually this individual did not turn over the film that he took at the scene, but turned over other film.

The other complaining witness in the trial court was a free-lance photographer for the Vidette, a weekly newspaper of general circulation in Grays Harbor County, Washington. He was not on an assignment for this paper at the time. He also trespassed on the property and took photographs. He was asked to turn over the film that he had taken. He handed the film that he had taken of the fire over to the petitioners and left the area. This also was part of the complaint against the petitioners for the crime of "Coercion."

The petitioners denied that any threats were ever made by them to the news reporters.

The Daily World news reporter denied that he had taken any photographs. The other individual admitted he had taken photographs of the fire on the petitioners' property.

Subsequently, the Grays Harbor County Prosecuting Attorney's Office charged the petitioners with Coercion and Assault. Petitioners were then required to go to trial to defend themselves. Petitioner Nicholas Kostello was found not guilty of the crime of Simple Assault, as charged in Count I of the complaint, but was found guilty of the crime of Coercion as charged in Count II and Count III of the complaint. Appendix J, App. 64, infra. The petitioner Gene Kostello was found not guilty of the

crime of Coercion as charged in Count III, but was found guilty of the crime of Coercion as charged in Count II and was found guilty of the crime of Simple Assault as charged in Count I.

During the trial it was obvious that the position of the prosecutor's office was that the news reporters had a right to trespass onto the petitioners property, and to take photographs, and the petitioners had no right to use reasonable force to recover the fruits of that trespass or prevent an invasion of their privacy.

After the conviction of the petitioners, a timely Motion for Arrest of Judgment and/or New Trial was filed in the Grays Harbor County District Court. The Grays Harbor County District Court denied the motion. Notice of Appeal was then filed with the Grays Harbor County Superior Court.

Argument on appeal was made to the Superior Court on August 14, 1989. The Superior Court held that the news media had no right, under the First Amendment, to trespass, maliciously, or otherwise. It further held that the petitioners had an absolute right not to be disturbed in their privacy. The petitioners had a right to order the trespassers off their property. The court further decided that neither of the news reporters had a right to retain film that was taken when they had trespassed. The court then held that as a matter of law, the acts of the petitioners on that night were not unreasonable and the case should have been dismissed. See Decision and Order, Appendix K, App. 66 infra.

The Superior Court also ruled that there should have been an instruction pertaining particularly to the

limitations of the news media. The conclusion of the Superior Court was that under the instructions given by the District Court the jury had to find that the trespass of the news media was malicious before the petitioners could use reasonable force to protect their right of privacy or to eject trespassers. The Superior Court concluded that the factual situation called for an instruction on the right of privacy as a subdivision of trespass, and that because a trial judge is supposed to see that justice is done, whether or not such an instruction was requested, it should have been submitted.

The Court of Appeals granted review to the prosecutor's office, and reversed the Superior Court's decision. The Supreme Court denied review. This petition followed.

REASONS FOR GRANTING CERTIORARI

Petitioners assert that their petition for writ of certiorari meets the requirements of Rule 10 of the Supreme Court of the United States of America. Specifically Rule 10.1(b)(c). This Writ should be granted because this case presents the Court with a rare opportunity to remove the confusion created by lower courts regarding the sometimes seemingly conflicting rights of the press and private property owners. These constitutional issues are of paramount importance and need to be authoritatively decided by this Court to clarify a confused area of law.

Question I: Did the instructions given by the trial court in the criminal action deny petitioners due process of law and a fair trial as required by the Fourteenth Amendment of the United States Constitution?

DISCUSSION:

The instructions given in the trial of the petitioners did not provide the petitioners a fair trial, and therefore their due process rights were violated. Jury instructions are only adequate if they allow the parties to argue their theories of the case, they are not misleading, and when read as a whole, they properly inform the jury of the applicable law. *State vs. Noel*, 51 Wn. App. 436, 753 P.2d 1017 (1988).

The petitioners' theory of the case was that not only did they have exclusive right to possession of their property, but they had a right to protect their privacy, even as against the news media. They further believed that they had a right to use reasonable force to protect those rights and the question of malice was irrelevant. The instructions given by the trial court, are included in the appendix. Appendix K, App. 68, infra. The instructions requested by the petitioners at the trial court level are also included in the appendix. Appendix D, App. 17, infra.

It is clear that under state law criminal intent is an element of simple assault. *State vs. Jones*, 34 Wn. App. 848, 664 P.2d 12 (1983).

An act cannot be considered a battery unless the actor intended to cause a harmful or offensive contact with another person. *O'Donaghue vs. Riggs*, 73 Wn.2d 814, 440 P.2d 823 (1968).

The instructions in the case against the petitioners allowed the jury to convict them of assault without criminal intent. The instructions also did not make it clear that

the news media has no more right to trespass on private property than any other member of the public.

The instructions given by the trial court prevented the petitioners from effectively arguing to a jury that they had no criminal intent and were merely acting in a reasonable manner to protect their rights. It also prevented them from effectively arguing that they had a right to eject the news reporters from their private property, and to deprive the news reporters of the fruits of their invasion of the petitioners' privacy.

It is constitutionally required that a jury be instructed on all essential elements of the crime charged, and due process requires that the State prove each essential element of the crime charged beyond a reasonable doubt. *In re Winship,* 397 U.S. 358 (1970); and it prohibits jury instructions which relieve the State of this burden. *Mullaney vs. Wilber,* 421 U.S. 684 (1975); *Sandstrom vs. Montana,* 442 U.S. 510 (1979). Jury instructions that omit essential elements of the crime charged relieve the state of this burden, for they permit the jury to convict without proof of the omitted elements. Therefore, such instructions violate due process.

The instructions should also have clearly spelled out the limitations of the news media regarding trespassing on private property. These limitations will be discussed in more detail further in this petition.

Question II: Did the charging documents in their criminal case sufficiently inform the petitioners of the nature and cause of the accusations against them as required by the Sixth Amendment to the United States Constitution?

DISCUSSION:

The United States Supreme Court held in *Hamling vs. United States*, 418 U.S. 87, 117 (1974) (citing *United States vs. Carll*, 105 U.S. 611, 612 (1882)) as follows:

> "It is generally sufficient that an indictment set forth the offense in the words of its statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense intended to be punished.' "

It is clear that the complaint in this case did not do this. The complaint does not indicate that an act cannot be considered a battery unless the actor intended to cause a harmful or offensive contact with another person.

Neither does the complaint indicate the alternative way in which an assault can be committed. That alternative way is that an assault is also an act done with an intent, or design to create in the victim's mind a reasonable apprehension of harm, whether or not such harm was actually intended. It is thus clear that the essential elements of the crime are not set forth in the charging document.

There is a split of authority in lower federal courts regarding whether or not all elements must be contained in the charging document.[1]

---

[1] A number of cases indicate that all elements must be contained in the charging document: *United States v. Wilson*,

(Continued on following page)

Some of the foremost legal scholars agree that all of the essential elements of a crime must be set forth in a charging document. 1. C. Wright, Federal Practice § 125, at 369-77 (2d Ed. 1982) states:

> If the statute omits an essential element of the offense or includes it only by implication, then pleading the statutory language will not suffice, and the omitted element must be alleged directly and with certainty . . .
>
> If knowledge or intent are not an element of a particular crime, then of course they need not be pleaded. An indictment of information is defective, however, in failing to allege these elements if they are expressly contained in the statute and criminal intent is an element of some crimes though not mentioned in the statute.

2. C. Torcia, Wharton's Criminal Procedure § 238, at 69 (13 ed. 1990) states that:

(Continued from previous page)

884 F.2d 174, 179 (5th Cir. 1989); *United States v. Crow*, 824 F.2d 761, 762 (9th Cir. 1987); *United States v. Opsta*, 659 F.2d 848, 850 (8th Cir. 1981); *United States v. Morrison*, 536 F.2d 286, 288 (9th Cir. 1976); *Honea v. United States*, 344 F.2d 798, 804 (5th Cir. 1985); *Lott v. United States*, 309 F.2d 115, 117 (5th Cir. 1962), cert. denied, 371 U.S. 950, 9 L. Ed. 2d 498, 83 S. Ct. 504 (1963).

Compare the preceding cases with the following cases which indicate that implied or nonstatutory elements need not be included in a charging document: *Tamapua v. Shimoda*, 796 F.2d 261, 263 (9th Cir. 1986); *Miller v. Stagner*, 757 F.2d 988, 994, 768 F.2d 1090 (9th Cir. 1985), cert. denied, 475 U.S. 1048, 89 L. Ed. 2d 577, 106 S. Ct. 1269 (1986); *United States v. Hester*, 719 F.2d 1041, 1043 (9th Cir. 1983); *United States v. Fusaro*, 708 F.2d 17, 23, (1st Cir.), cert. denied, 464 U.S. 1007, 78 L. Ed. 2d 708, 104 S. Ct. 524 (1983)

> [t]he constitutional right of the accused "to be informed of the nature and cause of the accusation" against him requires that every material element of the offense be charged with definiteness and certainty.

Petitioners are aware that the standard of review utilized by the federal courts for challenges to charging documents which are raised for the first time on appeal are as set forth in the case of *Hagner vs. United States,* 285 U.S. 427, 433 (1932), which states:

> "Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment."

It should be clear that there was prejudice in this case, by examining the elements instructions that were given to the jury. It also should be pointed out that a demand for a bill of particulars was filed, but no response was ever made to that demand.

Question III: Did the failure of the trial court to properly instruct the jury that the "news media" had no more right to trespass on private property than any other person constitute a taking of property in violation of the Fifth and Fourteenth Amendments and violate the petitioners' right of privacy and of a fair trial as guaranteed by said amendments?

DISCUSSION:

The trial court in petitioners' case refused to give the following proposed instruction:

> *You are instructed that members of the news media have no right to trespass on private property for the purpose of taking news pictures without the permission of the owner. Such an action by the news media is an invasion of a person's right to privacy.*
>
> *The use, attempt, or offer to use force upon or toward another person is not unlawful in the following cases:*
>
> *Whenever reasonable force is used to eject a trespasser from his property or to protect a right of privacy.* [Emphasis added]

The failure of the trial court to properly instruct the jury regarding the limitations of the news media denied defendants due process of law and a fair trial. In addition, the failure of the court to properly instruct the jury regarding the limitations of the news media constitute an unconstitutional taking of property in violation of the Fifth and Fourteenth Amendments and violated the petitioners' right of privacy as guaranteed by said amendments. This issue was discussed in the petitioners' Petition for Review to the Washington State Supreme Court on pages 22 through 25 inclusive. Appendix H, App. 56-59, inclusive.

In *Olmstead vs. United States,* 277 U.S. 438 (1927) Justice Brandeis in a dissent stated:

> [T]he makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of

> man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such an intrusion must be deemed a violation of the Fifth. *Id.* at 478-49.

This Court has expressed the right of privacy from the press. In *Cox Broadcasting Corp. vs. Cohn*, 420 U.S. 469, 487-91 (1975), supra, at 487, this Court noted:

> "[t]here is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attending publicity."

In *FCC vs. Pacifica Foundation*, 438 U.S. 726 (1978) the court held that the individual's right to be left alone in the privacy of his home outweighs the first amendment rights of an intruder. Citing *Rowan vs. Post Office Dept.*, 397 U.S. 728, 736-37 (1970).

It is thus clear that the rights of the news media are co-extensive with and do not exceed those rights of members of the public in general. *In re Greensboro News Co.*, 727 F.2d 1320 (4th Cir. 1984). The court in *Kaiser Aetna vs. United States*, 444 U.S. 164, 179-80 (1979), held that the

right to exclude is a fundamental element of the property right which cannot be taken away by the government without compensation.

This Court has noted that a newsperson "has no special privilege to invade the rights and liberties of others." *Associated Press vs. NLRB*, 301 U.S. 103, 132-33 (1937). In the interest of securing news or otherwise, "[n]ewsmen have no constitutional right of access to the scenes of a crime or disaster when the public is excluded . . . " *Branzburg vs. Hayes*, 408 U.S. 665, 684-85 (1972). The Second Circuit in *Galella vs. Onassis*, 487 F.2d 986 (2nd Cir. 1973), stated:

> "[t]here is no threat to a free press in requiring its agents to act within the law." *Id.* at 996.

The Federal Courts have held that, "[f]orbidding the taking of photographs . . . does not interfere with any constitutional right to freedom of speech or the press." *Tribune Review Publishing Co. vs. Thomas*, 254 F.2d 883 (3d Cir. 1958); see also *Rideau vs. Louisiana*, 373 U.S. 723 (1963).

It follows therefore that even though public officials may have a privilege to enter land, they have no right to consent to the entry of private land by news reporters. *Prahl vs. Brosamle*, 98 Wis.2d 130, 295 NW.2d 768 (Ct. App. 1980).

This Court has noted that there is a distinction between the access to gather news and the right to speak freely. In *Branzburg*, supra, Justice White wrote for the Court:

> "[i]t has been generally held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Id.* at 684.

In *Zemel vs. Rusk*, 381 U.S. 1 (1965), Chief Justice Warren, writing for the majority stated:

> [T]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. *The right to speak and publish does not carry with it the unrestrained right to gather information Id.* at 16-17 (Emphasis added).

Thus, the public is sufficiently informed through information obtained by news reporters by means other than access to private property.

The Federal Courts have noted that the First Amendment is not a license to trespass, and does not authorize members of and for the news media to trespass on another's property. The Ninth Circuit in *Dietemann vs. Time Inc.*, 449 F.2d 245, 249 (9th Cir. 1971), stated:

> "[t]he First Amendment is not a license to trespass . . . "

Additionally, *Stahl vs. State*, 665 P.2d 839 (1983), *cert. denied*, 464 U.S. 1069 (1984), held that the First Amendment did not shield newspersons from state criminal

prosecution for commission of trespass in their newsgathering function, nor was actual damage or intent to violate laws an element to the offense charged.

A property owner's right to exclude others is universally held to be a fundamental element of the property right. *Kaiser,* supra, at 179-80; *Evers vs. County of Custer,* 745 F.2d 1196 (9th Cir. 1984).

The failure of the trial court to properly instruct as to the rights to gather news on private property, basically resulted in the unconstitutional taking of petitioner's property without just compensation. In *Pruneyard Shipping Center vs. Robbins,* 447 U.S. 74 (1980), the Supreme Court considered whether the use, against the owners will, of private property for expression effects a "taking" of that property in violation of the Fifth Amendment. The concurring opinions in *Pruneyard* recognize the constitutional privacy rights limit the ability of the state to allow expressive conduct on private property, and analogously, the privacy right would limit newsgathering on private property. Justice Marshall and Justice Powell stated:

> "[A] law that required homeowners to permit speakers to congregate on their front lawns would be a massive and possibly unconstitutional intrusion into personal privacy . . . " 447 U.S. at 94.

Certainly the right to the exclusive possession of one's home premises is well recognized in the law. To interfere with that is an unconstitutional taking without just compensation.

As stated in *Nollan vs. California Coastal Comm'n.,* 483 U.S. 825 (1987):

> "[W]e have repeatedly held that, as to property reserved by its owners for private use, "the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 831.

CONCLUSION:

It is submitted that the petitioners were denied due process of law and a fair trial by the failure to give proper instructions in their trial. It is also submitted that the charging documents in this case did not sufficiently inform the petitioners of the nature and the cause of the accusations against them, particularly in regard to the charges of Assault. Since the law is very clear that the "news media" has no more right to trespass on private property than any other person, the failure to give clear instructions regarding this, and the right of the petitioners to protect their right of exclusive possession of their property and of privacy against the news media, deprived them of a fair trial and constituted an unconstitutional taking of their property without just compensation.

This Court is respectfully requested to issue a Writ of Certiorari to the Washington Supreme Court, and to the Washington Appellate Court, and reverse the decisions therein.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Appellant, v. NICHOLAS JOHN KOSTELLO and GENE PATRICK KOSTELLO, Respondents.	NO. 13443-8-II DIVISION TWO UNPUBLISHED OPINION FILED: October 31, 1991

PETRICH, J. – Nicholas Kostello was found guilty by jury verdicts in District Court of two counts of coercion, and his brother, Gene Kostello, guilty of one count each of simple assault and coercion. The Superior Court reversed, persuaded by the Kostellos' arguments claiming instructional error, evidentiary error and other defects in the proceedings. We accepted discretionary review and now reverse the Superior Court and affirm the convictions.

In the late evening of December 17, 1985, a fire broke out in a smokehouse in the back of the Kostello residence. During the course of its extinguishment by the local fire department, Greg Lehman, a Daily World photographer, and Mike Boss, a free-lance photographer, happened upon the scene. One of the Kostellos approached Lehman and told him to get off the property. He attempted to leave by the way he came but Kostello told him to follow him to the house and then to enter it. Lehman refused. A

threat was made to him, and he again refused, whereupon he was physically carried into the house. The people there demanded his film, despite his insistence that he had not taken any photographs. They forced him to relinquish the film and then permitted him to leave.

Mike Boss was also approached upon his arrival. One of the Kostellos told him that if he did not give the film up, he would "grab the goddamn camera, smash it, and confiscate his film and smash him too." Boss complied. The State charged the Kostello brothers with simple assault[1] and coercion.[2] They defended by asserting a theory of lawful use of force.[3]

In considering a case on discretionary review, we only consider the assignments of error to the District Court proceedings. We do not consider the assignments of error addressed to the decision of the Superior Court.

I. Instructional Errors

A. Jury Instructions Given

"The specific language of instructions is left to the discretion of the trial court." *Kjellman v. Richards*, 82 Wn. 2d 766, 768, 514 P. 2d 134 (1973). "The court does not abuse its discretion when the instructions, read as a whole, properly inform the trier of fact on the applicable law." *Petersen v. State*, 100 Wn. 2d 421, 441, 671 P. 2d 230 (1983). Instructions are proper if, when read as a whole,

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[1] RCW 9A. 36.040(1)

[2] RCW 9A. 36.070(1)

[3] RCW 9A. 16.020

they are readily understood, not misleading to the ordinary mind, and sufficiently clear. A further test is whether the instructions given allow counsel to satisfactorily argue his theory of the case to the jury. *State v. Hardy*, 44 Wn. App. 477, 480-81, 722 P. 2d 872, *review denied*, 107 Wn. 2d 1009 (1986).

The Kostellos contend that instruction 8 defining an assault and the elements instructions (instructions 11 and 12) were incomplete and misleading because they did not define intent and unlawful force. They are mistaken. In separate instructions, the court defined lawful force and intent. As noted above, the instructions are to be read as a whole. The instruction defining an assault is taken from WPIC 35.50. When used with instructions defining intent, assault is properly defined. *State v. Krup*, 36 Wn. App. 454, 459, 676 P. 2d 507, *review denied*, 101 Wn. 2d 1008 (1984). So long as unlawful force is also further defined, there is no error in the giving of the challenged instructions.

Kostellos next challenge the giving of instruction 13[4] on the defense of the lawful use of force because it was

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[4] It is a defense to a charge of Simple Assault that the force used was lawful as defined in this instruction.

The use of, or offer to use, force upon or toward the person or another is lawful when used or offered in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession and when the force is not more than is necessary.

The person using or offering to use the force may employ such force and means as a reasonably prudent person would

(Continued on following page)

premised on the requirement that the trespass be malicious. Relying on *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn. 2d 485, 506, 125 P. 2d 681 (1942), they contend that, as owners in possession, they were entitled to use such force as may be reasonably necessary to prevent unlawful entry even though such entry was not malicious. We disagree.

Peasley was not concerned with nor did it define the limits of lawful force as a defense to a charge of criminal assault. In *Peasley*, the court was reviewing the trial court's judgment n.o.v. dismissing a civil claim for malicious prosecution. The issue there was whether the want of probable cause of a criminal charge that is later dismissed may be overcome by proof of another crime so as to preclude the claim for malicious prosecution. Nevertheless, *Peasley* did refer to the statutory provision which sets out circumstances in which the use of force is lawful. That statute, RCW 9A. 16.020(3), in its present form, provides in part that the use of force against another is not lawful

> Whenever used by a party about to be injured . . . in preventing or attempting to prevent an offense against his . . . person, or a

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(Continued from previous page)

use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

The State has the burden of proving beyond a reasonable doubt that the force used or offered to be used by the defendant was not lawful.

> malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary; . . .

As *Peasley*, at 507, points out, the words "about to be injured" may be interpreted to mean injury in the general sense or merely injury to one's person. However, if the latter interpretation is adopted, force may never be used in the protection of property and the references to trespass and interference with property would be superfluous.

Whenever possible, a statute should be construed so that no portion of it is superfluous or inconsistent. *Smith v. Greene*, 86 Wn. 2d 363, 545 P. 2d 550 (1976). Accordingly, we interpret the statute to mean that necessary force used by one about to be injured (in a general sense) to prevent *a malicious trespass*, or *other malicious interference* with real or personal property lawfully in possession of the actor is not unlawful. Since use of force as is necessary is not unlawful when used to prevent a malicious trespass or malicious interference with property in lawful possession, the trial court's instruction was a correct statement of the law.

Instruction No. 15

The Kostellos also contend that Instruction No. 15 was in error because it did not explain the right to privacy or explain that the defendants had a right to use reasonable force to protect that right. Instruction No. 15 stated:

> An owner of real property has a right to exclusive possession of that property and that someone who comes on that property uninvited has a duty to leave when requested to do so by the owner.

The Kostellos did not object to this instruction at trial. Unless they can show error of constitutional magnitude, their failure to object precludes appellate review. *State v. Collins*, 45 Wn. App. 541, 553-54, 726 P. 2d 491 (1986), *review denied*, 107 Wn. 2d 1028 (1987). They claim they did object because they proposed a more expansive definition of the right to privacy. As long as instructions inform the jury of all the elements of the crime charged, there is no constitutional error. *State v. Scott*, 110 Wn. 2d 682, 691, 757 P. 2d 492 (1988). The failure to give a definitional instruction is not a failure to instruct on an essential element. *Scott* at 690. Hence, there are no constitutional grounds supporting review.

Nonetheless, we agree with the State's contention that the language "a right to exclusive possession" allowed the defendants to argue their theory of the case. Instructions are not in error if they allow counsel to argue his theory of the case to the jury. *State v. Hardy*, 44 Wn. App. at 480-81.

A simple reading of this instruction allows the Kostellos to argue that they had a right to privacy and to eject intruders on their property. The trial court did not abuse its discretion in giving this instruction or in rejecting the Kostellos' proposed instruction as the instruction

used defined the amount of allowable force as that which a reasonably prudent person might employ.[5]

B. Proposed Jury Instructions Refused

> A trial court is not required to give an instruction which is erroneous in any respect; it is not error to refuse to give an instruction if the subject is adequately addressed in another instruction given; a party is entitled to an instruction where there is evidence to support it; and it is error to give an instruction which is not supported by the evidence.

State v. Hoffman, 116 Wn. 2d 51, 111, 804 P. 2d 577 (1991). The failure to give a requested instruction is not error of constitutional magnitude. *State v. Thomas*, 110 Wn. 2d 859, 862, 757 P. 2d 512 (1988). Refusing an instruction is reversible error only if it prejudiced the defendant; that is, the refusal is reversible error only if, within reasonable probabilities, the outcome would have been different had the instruction been given. *Thomas*, at 862-63.

News Reporters' Right to Trespass & The Right to Privacy

The Kostellos contend they were not given a fair trial because the trial court did not instruct the jury that the

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[5] Kostellos' challenge to instructions 7 and 14 merit little discussion. No argument or authority was submitted to support challenge to instruction 7 and the challenge does not warrant consideration. *State v. Young*, 89 Wn. 2d 613, 625, 574 P. 2d 1171, *cert. denied*, 439 U.S. 870 (1978). Kostellos' challenge to instruction 14 does not include an objection to the language employed but merely claims an expanded definition in their proposed instruction should have been used. The rejection of their proposed instruction is dealt with below.

press has no greater right to trespass than an ordinary citizen and that the right to free exercise of speech does not overcome a private property owner's right to privacy. Such an instruction was necessary, they contend, because one can commit the crime of coercion Only if he induces a person to engage in conduct from which that person has a legal right to abstain.

The Kostellos proposed that the following instructions be given to the jury:

> You are instructed that members of the news media have no greater right to trespass on private property for the purpose of taking news pictures without the permission of the owner. Such action by the news media is an invasion of a person's right to privacy.
>
> The use, attempt, or offer to use force upon or toward another person is not unlawful in the following cases:
>
> Whenever reasonable force is used to eject a trespasser from his property or to protect a right of privacy.

These proposed instructions are incorrect statements of the law because they do not require that the trespass be malicious. A trial court need not give an instruction that is erroneous in any respect. *State v. Hoffman,* 116 Wn. 2d at 110.

Criminal Assault

The Kostellos proposed their own instruction outlining the elements of an assault. In place of the word

assault, this proposed instruction inserted the following language:

> (1) That . . . the defendant intended to cause a harmful or offensive contact with another person. (2) That the defendant did in fact act so as to cause a harmful or offensive contact with another person . . .

This definition is an incomplete statement of the law in that it does not allow an intentional act to create a reasonable apprehension and fear of bodily injury in another. As noted above, the trial court's instruction Nos. 11 & 12 correctly stated the law. Therefore, the court did not abuse its discretion in failing to use this proposed instruction.

Definitions of "Malice" and "Maliciously"

The Kostellos proposed that the following definitions be included with the instruction defining "malice" and "maliciously":

> A person is guilty of malicious trespass if he knowingly enters or remains unlawfully in or upon the premises of another.
>
> A person is unlawfully on the premises of another upon entry, unless that person reasonably believed the owner of the premises would have licensed him to enter or remain.

These are the statutory definitions for criminal trespass. *See* WPIC 60. 17; RCW 9A. 52.010(3); WPIC 65.02.

The Kostellos apparent motivation in proposing these instructions was to instruct the jury that the news reporters were on the property unlawfully. From this the jury

was to conclude that the use of force was lawful. However, Instruction No. 15 allowed the Kostellos to argue that they had the right to exclusive possession of their property; therefore, the trial court did not abuse its discretion in rejecting their proposed instruction because they were able to argue their theory of the case.

II. Allowance of Unlisted Rebuttal Witnesses

The Kostellos contend that they were unfairly prejudiced because the trial court allowed the State to present rebuttal witnesses who were not on the witness list. It is not error for a trial court to admit true rebuttal witnesses when their names do not appear on the witness list. *State v. White*, 74 Wn. 2d 386, 395, 444 P. 2d 661 (1968). As some rebuttal testimony will, at times, overlap or coalesce with the evidence in chief, the admissibility of such testimony rests with the trial court's discretion. *White* at 395. Here, the Kostellos have not shown that the testimony was not rebuttal testimony nor that the trial court abused its discretion.

III. Destruction of Material Evidence

The Kostellos contend that the trial court should have dismissed the case against them because the fire department destroyed a video recording of the fire. The prosecution was unaware of the tape when the defense first requested its production. It was revealed during the trial that John Nyman, a volunteer fireman, had recorded over the tape.

Under the Fourteenth Amendment to the United States Constitution, the prosecution has general duty to disclose material evidence exculpatory to the defendant. *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963); *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392, 2398 (1976). In order for the evidence to be constitutionally material, it must have an exculpatory value that is apparent before the police destroy the evidence, and it must not be available by other reasonably available means. *California v. Trombetta*, 467 U.S. 479, 81 L.Ed. 2d 413, 104 S. Ct. 2528 (1984); *State v. Straka*, 116 Wn. 2d 859, 810 P. 2d 888 (1991). However, when the evidence is only potentially exculpatory, the defendant must show that its destruction resulted from bad faith by the police; otherwise, the failure to preserve the evidence does not constitute a denial of due process of law. *Arizona v. Youngblood*, 488 U.S. 51, 57, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988); *Straka*, at 859.

The Kostellos first requested the trial court to order the production of the tape during the trial. The trial court denied the defense request because they could have obtained the evidence on their own. In voir dire, Mr. Boyer of the fire department testified that he had viewed the video, that neither of the defendants appeared on the tape and that it did not contain anything about the confrontations with Mr. Boss or Mr. Lehman. Because the evidence was only potentially exculpatory, the Kostellos needed to show that the police destroyed the tape in bad faith. The record reveals that Mr. Nyman recorded over the video tape and that this is the normal procedure once the department has viewed the tapes. There is no evidence that the police destroyed the tape in bad faith. The

Kostellos merely contend that Mr. Nyman should have known that a criminal action was proceeding and, therefore, not recorded over the tape. This does not constitute bad faith, and, therefore, we find no constitutional error.

IV. Admission of Testimony of Post-Incident Behavior

During trial, retired Sgt. Robertson testified about his investigation of the complaint against the Kostellos. The court allowed Robertson to testify that when he went to the Kostello residence, he asked Mrs. Kostello to give him the film. While Robertson described Mrs. Kostello as cooperative, he testified that he saw Nicholas pick up the film from the table, place it into his pocket, and then refuse to hand it over. The Kostellos assert that this testimony was not material and that its prejudicial effect outweighed any possible probative value.

The admission or refusal of evidence lies largely within the discretion of the trial court and will not be reversed on appeal absent a showing of an abuse of discretion. *State v. Guloy*, 104 Wn. 2d 412, 421, 705 P. 2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986). A manifest abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *Crescent Harbor Water Co. v. Lyseng*, 51 Wn. App. 337, 753 P. 2d 555 (1988).

We are unable to say that no reasonable person would take the view adopted by the trial court. The evidence had some degree of materiality supporting the State's version of the events. Nicholas' conduct was consistent with the victim's testimony and thus we fail to see

that the evidence's probative value was outweighed by any improper prejudicial effect.

V. Constitutionally Defective Complaint

The jury found Gene guilty of simple assault. The Criminal Complaint stated:

> 1.2 That I have reasonable grounds to believe, and do believe, the defendant(s) committed the crime(s) of SIMPLE ASSAULT, and COERCION (TWO COUNTS), as follows:
>
> COUNT 1
>
> On or about December 17, 1985, in Grays Harbor County, Washington, Nicholas John Kostello and Gene Patrick Kostello did assault Greg Lehman, a human being;
>
> CONTRARY to RCW 9A. 36.040(1).
>
> . . .

RCW 9A. 36.040(1) states: "(1) Every person who shall commit an assault or an assault and battery not amounting to assault in either the first, second, or third degree shall be guilty of simple assault."

A defendant can challenge the sufficiency of the charging document because it fails to allege the essential elements of the offense for the first time on appeal. However, a defendant may not challenge a charging document for "vagueness" on appeal if he failed to request a bill of particulars at trial. *State v. Leach,* 113 Wn. 2d 679, 687, 782 P. 2d 552 (1989).

"[T]he 'essential elements' rule requires that a charging document *allege facts supporting every element of the*

offense, in addition to adequately identifying the crime charged." *Leach* at 689. While here the complaint does not include the nonstatutory intent element, it does follows [sic] the statutory language. *See State v. Strong*, 56 Wn. App. 715, 785 P. 2d 464, *review denied*, 114 Wn. 2d 1022 (1990) (implied element of intent unnecessary if the complaint follows the statutory language); *State v. Mathews*, 60 Wn. App. 761, 807 P. 2d 890 (1991) (custodial assault); *State v. Davis*, 60 Wn. App. 813, 808 P. 2d 167 (1991) (assault in the fourth degree). The complaint was adequate.

The Superior Court's order is reversed and the District Court's judgment and sentence is affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

/s/ Petrich J.

WE CONCUR:

/s/ Worrwick, C.J.

/s/ Moyan, J.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NICHOLAS JOHN KOSTELLO and GENE PATRICK KOSTELLO, Petitioner.	NO. 58876-7 C/A NO. 13443-8-II

This matter came before Department I of the Court on its March 3, 1992, Motion Calendar on Petition for Review. Department I having considered the Petition and the files herein;

Now, therefore, it is hereby

ORDERED:

That Petition for Review is denied.

DATED at Olympia, Washington this 3rd day of March, 1992.

/s/ Fred H. Dore
CHIEF JUSTICE

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON, Respondent, v. NICHOLAS JOHN KOSTELLO and GENE PATRCIK [sic] KOSTELLO, Appellants.	No. 13443-8-II MANDATE Grays Harbor County Cause No. 87-1-00316-0

The State of Washington to: The Superior Court of the State of Washington in and for Grays Harbor County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on October 31, 1991, became the decision terminating review of this court of the above entitled case on March 3, 1992. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

[SEAL] IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 29th day of April, 1992.

/s/ David Ponsoha
Clerk of the Court of Appeals,
State of Washington, Div. II

Presiding Judge
Indeterminate Sentence Review Board

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APPENDIX D

THE COURT: Regarding your last exception for the record, the court notes that the evidence does not support the reading of the state's proposed instruction regarding the Authority of the Chief at the fire.

Regarding the other exceptions, trying, giving instructions, number thirteen, fourteen, and fifteen. The court, uh, satisfied that the evidence, uh, admitted at trial, sufficient to support the giving of an instruction regarding right of a person to use reasonable force, under the facts and circumstances to prevent a trespass.

Mr. Burtch?

BURTCH: Your Honor, uh, on behalf of the defendants I object to instruction number seven. It says a person commits the crime of Simple Assault, when he assaults another person, because that's a meaningless instruction. It doesn't define what the word assault means, and uh, it's, it's not needed if you do have such a definition of assault, which is instruction number eight.

Instruction number eight I object to as being an incorrect statement of law, and believe the court should have gave him, uh, give him my alternative instruction.

I believe that the instruction number eight is an incorrect statement of law, and the instruction that should have given is the instruction proposed by the defendant, which reads as follows:

An assault is an act with unlawful force done with an intent to commit a battery against another person. An act can not be considered a battery, unless the actor intended to cause a harmful or offensive contact with another person. . . .

An assault was also an act done with an intent, or design to create in the victim's mind a reasonable apprehension of harm, whether or not such harm was actually intended. . . .

I believe the cases I cited to the court establish clearly that, that is the law, and that the law as stated in instruction number eight is not the law. In fact it would be a violation of the, of police power's of the, uh, state, which requires the laws to be reasonable, and uh, solve the problem it's intended to solve. And just intentionally touching somebody without any, uh, intention to commit a battery against that person, or to create in that victim's mind a reasonable apprehension of harm. Would mean that each day we all commit numerous assaults, and in fact just by merely touching a person to get their attention. Under that, uh, definition, uh, my clients would be guilty of assault, and I can not conceive that, that is the law. And it is certainly inconsistent with the cases I cited to court, which do support the definition that I gave.

Um, I also uh, would object to instruction number eleven because it does not contain the element, which State vs. Jones, that I cited to the court says is necessary, that is there be a criminal intent, which is an intent to commit a battery, or create a apprehen . . . , a reasonable apprehension in the mind of a person that he's going to be harmed by the act of the, uh, actor.

Same objection to twelve.

I object to number fourteen because it is not complete. I believe that the following paragraph should be edited in fourteen, and we did suggest this. I believe that fourteen should read as follows:

Malice and maliciously mean an evil intent, wish, design to vex, annoy, or injure another person.

Malice may be inferred from an act done in wilful disregard of the rights of another. . . .

A person is guilty of malicious trespass if he knowingly enters or remains unlawfully in or upon the premises of another.

A person is unlawfully on the premises of another upon entry, unless that person reasonably believed the owner of the premises would have licensed him to enter or remain. . . .

That's verbatim from, uh, Criminal trespass in RCW 9A.52. Uh, I assume that instruction number twenty is taken from WPIC, if so, I have no objection to that.

I do object to the fact that all the verdict forms were those proposed by the prosecution, instead of the defendant. I guess that, that's really a matter of the court's discretion, so I'm not going to make that an issue.

I further object to the failure of the court to give the instruction I proposed, and failure to back that instruction up. The instruction I propose, that the court tell the jury, that a news reporter has no greater right to trespass than any other person. I certainly intend to argue that point just because that is the law, but I think it should be contained in the, uh, instructions.

I also object to the failure of the court to give the instruction, which says as follows, this is proposed by the defendant;

To convict the defendant of the crime of Simple Assault each of the following elements must be proved beyond a reasonable doubt:

That on or about the 17th day of December 1985, the defendant intended to cause a harmful or offensive contact with another person;

That the defendant did in so, did in fact act so as to cause a harmful or offensive conduct, contact with another person, and that the acts occurred in Grays Harbor County, Washington:

If you find from the evidence that each of these elements has been proved

beyond a reasonable doubt, then it will be your duty to return a verdict of guilty;

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty. . . .

The reason for that again is State vs. Jones, and all the other cases that I've read, which says there has to be a criminal intent. And that intent, criminal intent that's required in any assault, is that they intended to, to cause a battery, or they intended to cause appre . . . , a reasonable apprehension in the mind of the person, uh, that he was going to receive a battery.

Uh, I also object to the failure of the court to instruct, to make this following instruction;

Your instructed, the members of the news media have no right to trespass on private property for the purpose of taking news pictures, without the permission of the owner. Such action by the news media is an invasion of a person's right of privacy.

I believe that, that's quoted by the cases both in Washington, that I cited, and cases from other states that I cited in my trial memorandum.

Uh, I also object to the failure to give this instruction;

The use, attempt or offer to use force upon or toward another person is, is not unlawful in the following cases;

Whenever reasonable force is used to eject a trespasser from a person's property, or to protect a person's right of privacy. . . .

I believe that, although a case law has not yet addressed this problem, that they will, that a right of privacy is a right, which you have a, a right to protect, and you have a right to use reasonable force to protect, uh, that right. And I don't think that there can be any argument that there is a right of privacy, and I've stated the cases, uh, that establish that.

I also cite the court to Article I Section VII of the Washington State Constitution.

I believe that cover's my objections, your Honor.

THE COURT: Alright, the court, uh, for the record will state that one of the cases cited by the defendants, *State vs. Krupt*, 34 Washington second, Washington Appelate [sic]. Regarding Instruction number eight, define assault, that case specifically approved the Washington Appelate [sic] instruction, which the court has given in this case.

APPENDIX E

GRAYS HARBOR COUNTY DISTRICT COURT

STATE OF WASHINGTON, Plaintiff, vs. NICHOLAS JOHN KOSTELLO, and GENE PATRICK KOSTELLO, Defendant.	NO. P-2439 MOTION FOR ARREST OF JUDGMENT AND/ OR NEW TRIAL

COMES NOW the defendants and move the court for arrest of judgment in the above-entitled case, or in the alternative for a new trial. The grounds for said motions are as follows:

(1) There was insufficient proof in the record to prove the charges.

> The news men in this case were clearly guilty of criminal trespass. The defendants had a right of privacy. The rights of the defendants to exclusive possession of the premises, and to a right of privacy was violated by the trespass committed by the complaining witnesses who were members of the news media. Under such facts, the defendants had a right to engage in the conduct they engaged in, to protect their right of privacy and their right to exclusive possession of the premises. The complaining witnesses had no right to take the pictures, or refuse to give the film to the defendants when requested as they were trespassers and the pictures were a violation of defendants' rights of

privacy. If there had been no trespass, nothing would have occurred.

(2) Error of law occurring at the trial and objected to at the time by the defendants.

The court incorrectly allowed rebuttal witnesses by the prosecution that were not in the prosecution's list of witnesses. Furthermore even though demanded, the statements of the defendants in the possession of the prosecution were not supplied to the defense. The instructions were incorrect statements of the law, and were not complete. These errors were material, and without such error it is believed that the defendants would not have been found guilty of any charge.

(3) The verdict or decision is contrary to law and to the evidence.

The law is clear that the defendants had a right of privacy. It is also clear that the news media had no right to trespass on the defendants property. Instructions making this clear to the jury were necessary, and caused a decision contrary to law. The instruction regarding assault was unconstitutional, and was contrary to settled case law. The instruction on assault permeated every part of the trial, and prevented the defendants from having a fair trial, and caused a verdict which was contrary to law.

(4) Substantial justice has not been done.

In this case the real culprits were the trespassers on defendant's property. They had no right to be where they were, or to take the pictures. No instructions concerning this were given to the jury causing an injustice to be done.

The specific case authority on these points is contained in the trial memorandum furnished to the court.

Respectfully submitted,

/s/ Jack L. Burtch
JACK L. BURTCH
Attorney for Defendants

Copy received this 25 day of September, 1987.

s/ William P. Gilbert
Office of the Prosecuting Attorney

APPENDIX F

(Filed Dec. 7, 1987)

SUPERIOR COURT OF WASHINGTON
FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON, Plaintiff, vs. NICHOLAS JOHN KOSTELLO, and GENE PATRICK KOSTELLO, Defendant.	NO. NOTICE OF APPEAL

Comes now Nicholas John Kostello, and Gene Patrick Kostello, the above-named defendants, and appeal from that Judgment entered on a verdict of a jury trial, which Judgment was entered November 23, 1987. The decisions which defendants want reviewed are set forth in their Motion for Arrest of Judgment and/or New Trial which was filed in the Grays Harbor County District Court, a copy of which is attached hereto and incorporated herein by this reference. They seek appeal to the Grays Harbor County Superior Court. Said case is a criminal case and the appeal is taken from the Grays Harbor County District Court, Department No. 1, Cause No. P-2439.

The State of Washington is represented by the Grays Harbor County Prosecuting Attorney with offices at the Courthouse in Montesano, Washington. Telephone 249-3951. Attorney for the defendants is Jack L. Burtch

with offices at 106 East First Street, Aberdeen, Washington, telephone 533-1982. Addresses of the defendants are 5702 Olympic Highway, Aberdeen, Washington.

DATED: December 6, 1987

/s/ Jack L. Burtch
JACK L. BURTCH
Attorney for Defendants

APPENDIX G

* * *

(1982). The state in this case of course would be the County of Grays Harbor, *State vs. Agren,* supra.

In conclusion it is submitted that the State failed to meet the requirements of RAP 2.3(d) in that the decision of the Superior court is not in conflict with any decision of the Court of Appeals or the Supreme Court, nor did the Superior Court so far depart from the accepted and usual course of judicial proceedings as to call for review by the appellate court. The Motion for Discretionary Review should have been denied, and defendants should be awarded their costs on appeal, including statutory attorney fees.

Respondents' Assignment of Error No. 2.

Whether the trial court committed error in the instructions given to the jury?

Issues:

(1) Did the court correctly define "criminal assault" in instructions 7 and 8?

(2) Should the court in the elements instruction on assault, instructions 11 and 12, have included as an element the necessity of proving a criminal intent?

(3) Did instructions 13 and 14 properly define the circumstances under which property owners may use reasonable force in preventing a trespass or protecting their right of privacy?

These issues will be discussed together.

Copies of instructions number 7 and 8 as given by the court are set forth in their entirety in the appendix. Objections to these instructions were timely made. (TR 322-323).

Instruction number 7 regarding simple assault is meaningless, and it prejudicially emphasized the theory of the prosecution, and prevented defendants from having a fair trial on this issue.

Instruction number 8 was an incorrect statement of law, which error permeated the entire trial on every issue.

Also instructions number 11 and 12 which were the elements instructions of simple assault were not complete. These instructions did not define, or include the element of criminal intent or unlawful force. See appendix for copies.

Criminal intent is an element of simple assault. *State vs. Jones*, 34 Wn. App. 848, 664 P. 2d 12 (1983).

An act cannot be considered a battery unless the actor intended to cause a harmful or offensive contact with another person. *O'Donoghue vs. Riggs*, 73 Wn. 2d 814, 440 P. 2d 823 (1968).

The instruction in the case against the defendants allowed conviction of an assault without a criminal intent. Instruction number 8 does not define what unlawful is, nor does it adequately point out that a person has to intend to cause a harmful or offensive contact with another person, or to do an intentional act with the intention to create a reasonable apprehension of fear of bodily injury even if the actor did not actually intend to inflict bodily injury.

In connection with this argument, the court committed error when it refused to give the instruction proposed by the defendants which read as follows:

> An assault is an act with unlawful force done with an intent to commit a battery against another person. An act cannot be considered a battery, unless the actor intended to cause a harmful or offensive contact with another person.
>
> An assault is also an act done with an intent, or design to create in the victim's mind a reasonable apprehension of harm, whether or not such harm was actually intended. (TR 322-23).

Error has been assigned to the failure to give this instruction.

In *State vs. Acosta,* 101 Wn. 2d 612, 683 P. 2d 1069 (1984), the court made it very clear that the long standing rule in Washington is that a criminal assault requires unlawful force.

Defendants concede that if the State's theory was that if the defendants' intent was to create a reasonable apprehension of fear of bodily harm in the victim's mind rather than to inflict actual bodily injury, assault instructions need not include the element of an attempted battery. However, in this case the instructions presented two theories of liability, both theories of which are instructed incorrectly. The first part of the instruction given by the court allows a conviction of assault without requiring the element of unlawful force. The second instruction is contrary to the law in that the State is relieved from proving that the defendants acted with an intent or design to

create in the victim's mind a reasonable apprehension of harm. Instruction number 8 only requires that there be an intentional act, which creates in another a reasonable apprehension and fear of bodily injury without specifying the act must be done with an intent or design to create that apprehension in the mind of a victim.

It is admitted that there are two concepts of assault where a battery is not committed. One concept is that an assault is an attempt to commit a battery. The second concept is that an assault is "committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm. But as stated in *State vs. Krup*, 36 Wn. App. 454, 458, 676 P. 2d 507 (1984):

> Although Krup's criminal assault charge falls into this second category, the State is not relieved from proving Krup acted with an intent or design to create in his victim's mind a reasonable apprehension of harm; negligence alone is insufficient.

To summarize, the law makes it clear that there must be an intent either to commit a battery, or to cause a reasonable apprehension of the battery. The instruction given by the court does away with the element of unlawful force and confuses the necessary criminal intent to either cause a battery or to put somebody in apprehension of a battery with the intention merely to touch a person without that person's permission. Such instruction completely deprives a defendant from convincing a jury that he had no criminal intent and was merely acting in a reasonable manner to protect his rights.

Due process requires that each element of the crime must be proved beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 25 L Ed.2d 368, 90 S. Ct. 1068 (1970); *State vs. Shipp*, 93 Wn. 2d 510, 610 P. 2d 1322 (1980).

In 1975 the State Legislature made a complete revision of the State's criminal law. (1st. Ex. Sess. 1975, Ch. 260, RCW 9A).

The legislature in that revision provided that the provisions in 9A.04 through 9A.20 applied to Title 9A and to all other statutes defining a crime. RCW 9A.04.010(2); RCW 9A.04.090.

RCW 9A.04.090 states:

> The provisions of Chapter 9A.04 through 9A.28 RCW of this title are applicable to offenses defined by this title or another statute, unless this title or such other statute specifically provides otherwise.

Basically the 1975 revision of the criminal law did away with strict liability and liability without fault offenses. RCW 9A.04.020(1)(b) states:

> The general purposes of provisions governing the definition of offenses are:
>
> (b) To safeguard conduct that is without culpability from condemnation as criminal.

This revision was consistent with the existing trend of criminal law which predated this legislation. *State vs. Turner*, 78 Wn. 2d 276, 474 P. 2d 91 (1970); *State vs. Hennings*, 3 Wn. App. 483, 475 P. 2d 926 (1970).

State vs. Turner, supra, in ruling that felonious intent was a necessary and therefore an implied element of the

crime of public desecration of our country's flag the court, sitting en banc, said at page 283:

> Unless the statute expressly eliminates the element of intent or design or defines the kinds of offenses which, by their very nature, are classified judicially as mala prohibita, the ingredients of intent, design and purpose should be deemed indispensable to a proof of guilt.

Assault is a crime requiring a criminal intent and is a crime of moral turpitude. *State vs. Norby*, 20 Wn. App. 378, 579 P. 2d 1358 (1978). This is to say that assault is a crime mala per se. The present legislation does away with the difficult necessity of categorizing an act as whether mala per se or mala prohibita.

The legislature must expressly exclude a statute creating an offense from the culpability requirements of Title 9A or they are elements of the crime. RCW 9A.04.010(2).

Instructions 13 and 14 improperly define the circumstances under which property owners may use reasonable force in preventing a trespass. If a person has a right to use reasonable force those acts are without criminal intent.

Respondents' Assignment of Error No. 3.

Whether the court committed error in failing to give respondents' requested instructions?

Issues:

(1) Did the court commit error in failing to instruct the jury that a news reporter has no greater right to trespass than any other person?

(2) Did the court commit error in failing to give instructions regarding the right of privacy and the right to use reasonable force to protect that right just as you have the right to use reasonable force to protect a trespass?

(3) Did the court commit error by failing to give defendants' proposed definition of criminal assault and proposed elements instruction on assault?

(4) Did the court commit error by failing to give defendants' instruction number 14 defining Malice and Maliciously?

As stated a person owning or lawfully in possession of property may use such force as is reasonably necessary to eject trespassers. See previous citations.

Also see argument regarding proposed instructions contained in the first part of this brief.

Under Art. 1, § 7 of the Washington State Constitution, no person shall be disturbed in his private affairs, or his home invaded without authority of law.

Our court is determined that a person has a protectable interest in privacy. *Mark vs. Seattle Times*, 96 Wn. 2d 473, 635 P. 2d 1081 (1981). That court adopted the following language from Restatement (Second) of Torts § 652(b) which reads as follows:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

The press has no right to trespass on another's property, or to invade that person's privacy. The protectable interest in privacy is generally held to involve four distinct types of invasion: intrusion, disclosure, false light and appropriation. These four privacy torts are related in that "each involved interference with the interests of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears, and publications of others." *Eastwood vs. Cascade Broadcasting*, 106 Wn. 2d 466, 722 P. 2d 1295 (1986). The defendants had no desire for news reporters to come on their property, or to take pictures of the fire, or to publish those pictures.

Where the rights of a private property owner conflict with those of a person desiring to exercise free speech, the property rights are not absolute and there must be a balancing of the competing interests. However, where private property is not ordinarily held open to the public, access to it for the purpose of exercising First Amendment rights may be denied altogether. *Sutherland vs. Southcenter Shopping*, 3 Wn. App. 833, 478 P. 2d 792 (1970).

Under the federal constitution persons engaged in the business or profession of publishing or otherwise communicating with the public are entitled to no greater protection than citizens who are not so engaged. *Rhinehart vs. Seattle Times*, 98 Wn. 2d 226, 654 P. 2d 673 (1982).

In this case the news media people were asked to leave, and not to take pictures. According to the defendants both of them were taking pictures. One of them did in fact leave. The other refused to leave and continued taking pictures. The defendants exercised their right to

protect their right to privacy by insisting that the pictures which were taken while the reporters were trespassing on their property and violating their right of privacy be delivered to them. The smokehouse that was on fire was not visible from the road, and was not visible to the news media without their trespassing on the defendants' property. Defendants had a reasonable expectation of privacy.

Such a situation is no different than if the news media person trespassed onto the back secluded part of the defendant's property and took pictures of the defendants while they were nude in a hot tub.

In this case there was an invasion of an area which was private to the defendants. No one would want strangers wandering around their back yard at night without permission of the owners. In fact it would be quite frightening to see strangers in such a location and it would be highly offensive to a reasonable person.

The fact is that the news reporters criminally trespassed on the property of the defendants. RCW 9A.52.070-090. A person has a right to use reasonable force to prevent a trespass on his property. RCW 9A.016.020. It follows they have the same right to protect their privacy.

The law makes it very clear that a right of privacy exists in the State of Washington. The trial court committed error by refusing to give defendant's instruction which reads as follows:

> The use, attempt, or offer to use force upon or toward another person is not unlawful in the following cases:

> Whenever reasonable force is used to eject a trespasser from his property or to protect a right of privacy. (TR 327).

The court should further have made it clear, which is the law, that the press has no further rights to trespass on private property than any other member of society. The following instruction should have been given:

> You are instructed that members of the news media have no right to trespass on private property for the purpose of taking news pictures without the permission of the owner. Such action by the news media is an invasion of a person's right of privacy. (TR 326).

Failure to give these instructions deprived the defendants of a fair trial. It was important to define the right of privacy in the instructions because the crime of Coercion can only be committed if a person is induced to engage in conduct which he has a legal right to abstain from. Certainly a person cannot abstain from giving up the fruits of his invasion of a person's privacy, or of his trespass on their property.

It is clear that the defendants had a right of privacy in existence at the time of the alleged offense. What good is the right of privacy if that right cannot be protected. Basically a violation of a person's right of privacy is a trespass. One has the right to use reasonable force, determined by the circumstances, to remove a trespasser, or to protect their right of privacy.

Neither the fire department, or the sheriff's department has any authority to extend consent to a news reporter to enter land rightfully in the possession of the

defendants. *Prahl vs. Brosamle,* 295 N.W.2d 768 (1980). The court stated in that case as follows:

> We will not imply a consent as a matter of law. It is of course well known that news representatives want to enter a private building after or even during a newsworthy event within the building. That knowledge is no basis for an implied consent by the possessor of the building to the entry . . .

Few private persons anticipate, however, that an unplanned newsworthy event will occur on their property. An advance objection to entry under remote possible circumstances need not be made, and it is unreasonable to require an objection after entry under distracting circumstances, especially when the identity is unknown. *Prahl vs. Brosamle,* supra. That court also stated that the First Amendment is not a license to trespass and they concluded that a constitutional privilege to trespass does not exist.

In *Anderson vs. Wroc-TV,* 441 NYS.2d 220 (1981) the court held that the gathering of news and the means by which it is obtained did not authorize, whether under the First Amendment or otherwise, entry by television stations employees into the home of plaintiffs despite request of plaintiffs that they stay out; thus, conduct of stations employees in entering plaintiffs' home was not privileged and nontrespassory, despite contention that fact that a genuinely newsworthy event was occurring in plaintiffs' home either made the plaintiffs' premises open to public by custom and practice or gave rise to implied consent on the part of the plaintiffs to entry.

A place does not necessarily become a "public forum" for purposes of the First Amendment even where members of the public are freely permitted to visit. *Brush vs. Pennsylvania State University,* 414 At1.2d 48. In the case of *People vs. Weeks,* 591 P. 2d 91 (Colo.) the court stated on page 96 as follows, to wit:

> The First Amendment does not extend to any person the right to use his power of speech as a battering ram to destroy the tranquillity and repose of another person's home. (Citation omitted).
>
> The ancient concept that "a man's home is his castle" into which "not even a king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.

A recent case from Oklahoma *Stahl vs. State,* 665 P. 2d 839, a case in which the United States Supreme Court denied review, held that the First Amendment does not shield news persons from liability for torts and crimes committed in the course of news-gathering.

Washington cases are to the same effect. See previous citations. *Sunnyside vs. Lopez,* 50 Wn. App. 786, 751 P. 2d 313 (1988), indicated that the private owner had a right to remove a trespasser and utilization of the police to enforce that private owner's rights did not constitute "state action" of the kind which invokes a trespassers' free speech rights under the First Amendment. The court in that case on page 794, stated as follows, to wit:

> We hold that the specific invitation extended by the doctor-tenants of Sunnyside Professional Center to members of the public

who seek their medical expertise is not sufficient to classify the center as open to public use.

In *Bradley vs. American Smelting*, 104 Wn. 2d 677, 709 P. 2d 782 our court adopted the following language in the restatement of torts, to wit:

> The Restatement (Second) of Torts § 158 (1965) states:
>
> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
>
> (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
>
> (b) remains on the land, . . .

In *Southcenter Joint Venture vs. NDPC*, 113 Wn. 2d 413 (1989), the court held that no one has a right to, under the free speech provision of the Washington Constitution (Const. art. 1, § 5), solicit contributions and sell literature in a privately owned shopping mall.

In *Beard vs. Akzona Inc.*, 517 F. Supp. 128 (1981), that court discussed the right of privacy, and concluded that whether information gained by reason of intrusion into plaintiff's physical solitude or seclusion was ever publicized is irrelevant to intrusion form of invasion of privacy.

The message is clear. Strangers have no right to trespass on secluded areas of a person's property, even if those strangers happen to be news reporters

Respondent's Assignment of Error No. 4.

Whether the Judge should have allowed witnesses to testify on rebuttal when their names were not in the list of witnesses filed by the prosecution, and where the testimony was as to matters relevant to the prosecution's case in chief?

Issue:

What is the effect of the prosecution's failure to comply with the court rule requiring a list of witnesses to be furnished to the defense?

Defendants' claim that the trial court incorrectly allowed witnesses to testify as rebuttal witnesses, when they were not included on the list of witnesses, when the testimony in fact was basically related to the State's case in chief. The District Court held that because all of the rebuttal witnesses were named in the police reports, it would not exclude the witnesses.

This case occurred in 1985. The rule applicable at the time of the trial was in 1987. See Justice Court Criminal Rule 3.10 (JCrR 3.10). A copy of that rule is found in the appendix hereto. It is obviously a mandatory rule. There is no limitation contained in the rules as to the sanctions. JCrR 3.10 is very similar to RCW 10.37.030 which was the statute interpreted in *State vs. White,* 77 Wn. 2d 386, 444 P. 2d 661 (1968).

According to *State vs. White,* supra the court would have had authority to exclude the testimony of the witnesses for failure to include the witnesses in the State's list of witnesses. In addition *State vs. White,* held that rebuttal evidence is admitted to enable the State in a

criminal case to answer new matter presented by the defense. It is not to be used by the State to withhold substantial evidence which should have been presented in its case in chief; however, as it frequently overlaps with evidence in chief, it is a difficult area resting largely in the trial court's discretion. The Supreme Court will reverse its determination only for a manifest abuse of such discretion. It is claimed that such a manifest abuse occurred in this case, and that it was merely one of the many things which deprived the defendants of a fair trial. A reading of the rebuttal testimony indicates that it is clearly testimony basically related to the State's case in chief.

In *State vs. Laureano*, 101 Wn. 2d 745, 682 P. 2d 889, the court in interpreting a similar rule in the Superior Court Criminal Rules, made it clear that the rule is mandatory, and a court has authority to determine a case for failure of the State to provide a complete list of its witnesses. The courts rulings in this regard indicates another failure in providing defendants' with a fair trial.

Respondents' Assignment of Error No. 5.

Whether the charging documents in this case were constitutionally defective?

Issue:

Did the charging documents meet the "essential elements" constitutional rule?

The complaint in this case regarding simple assault is constitutionally defective. A copy of the complaint is in the appendix to the brief. A document charging a misdemeanor either in the form of a complaint or a citation and

notice to appear, but which does not adequately identify the crime charged and fails to allege facts supporting every statutory element of such crime, is subject to dismissal for violation of the defendants' due process right to be apprised with reasonable certainty of the nature of the accusation. This is the "essential elements" rule. *State vs. Leach*, 113 Wn. 2d 679 (1989).

Respondents' Assignment of Error No. 6.

Whether the case should have been dismissed on the basis of a violation of due process when material evidence had been destroyed by the fire department?

Issue:

Does destruction of evidence either inadvertently or intentionally, which has the potential for being helpful to the defendants' case, violate their due process rights?

The fire department destroyed the video tape that was

* * *

APPENDIX H

* * *

4. Did the charging documents in this case meet the "essential elements" constitutional rule?

5. Did the court's failure to comply with the court rule requiring a list of witnesses to be furnished to the defendants prejudice their right to a fair trial?

6. STATEMENT OF THE CASE

Petitioners were defendants in a Grays Harbor County District Court action. Each of them was charged with one count of Simple Assault and two counts of Coercion. See Appendix.

A fire occurred on the defendants' home premises on December 17, 1985. TR 213. The defendants are brothers and reside at their home premises with their parents. The Kostello family had a smokehouse in back of their home which they used to cure and smoke meat. TR 213. The smokehouse was not visible from the road, nor would it be visible to anybody unless they were given permission to come on the property or deliberately trespassed. TR 236, 259, 283, 284. The smokehouse caught on fire. The defendants did not call the fire department, however they had no objection to the fire department coming on their property for the purpose of putting out the fire. TR 215.

During the time that the fire department was on defendants' property, two news reporters, without the invitation of the defendants, or any other member of their family, and without permission, trespassed on the

* * *

> defendants were abrasive or not (and I don't know whether they were, or not) I don't think citizens should be treated this way. I don't think the power of the State, and the power of the prosecuting attorney, ought to be turned on citizens for something as minor as this. (RP November 9, 1989, 4.)

It is submitted that a careful reading of the transcript of the trial court proceeding shows that in fact the defendants were not given a fair trial, and that the instructions given did not allow them to effectively argue their theory of the case and were incorrect statements of law. This trial resulted in a gross denial of due process.

Issue No. 1:

Did the instructions given by the trial court deny defendants due process of law?

Defendants believe that the instructions given by the trial court were in error and contrary to their constitutional rights. The basic protection that a person has against misuse of the vast governmental police power is Washington State Constitution Art. 1, § 3. It states very simply:

> No person shall be deprived of life, liberty, or property without due process of law.

The instructions given in the trial of the defendants did not provide the defendants a fair trial, and therefore their due process rights were violated. Jury instructions are only adequate if they allow the parties to argue their theories of the case, they are not misleading, and when

read as a whole, they properly inform the jury of the applicable law. *State vs. Noel*, 51 Wn. App. 436, 753 P. 2d 1017 (1988).

The defendants' theory of the case was that not only did they have exclusive right to possession of their property, but they had a right to protect their privacy, even as against the news media. They further believed that they had a right to use reasonable force to protect those rights and the question of malice was irrelevant. Instruction number 14 given by the court was an improper instruction in the fact context of this case. It states:

> Malice and maliciously mean an evil intent, wish, or design to vex, annoy, or injure another person.
>
> Malice may be inferred from an act done in willful disregard of the right of another. WPIC 2.13, 1986 Supp.

Malice should not have been an issue in this case. Common law has always given a lawful owner or occupant of premises the right to retain possession and use such force as may be reasonably necessary to prevent an unlawful entry, or to remove trespassers or intruders. *Peasley vs. Puget Sound Tug and Barge Co.*, 13 Wn. 2d 485, 125 P. 2d 681; *Crouch vs. Ringer*, 110 Wash. 612, 188 Pac. 782 (1920); *Austin vs. Metropolitan Life Insurance Co.*, 106 Wash. 371, 180 Pac 134 (1919); 6A CJS § 24 (1975) Ed.

RCW 9A.04.060 provides that the common law is to supplement all criminal statutes.

The legislature has confused the issues in this case with inconsistent definitions of malice and has not made it clear when malice applies to a particular situation.

RCW 9A.16.020(3) states as follows:

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
>
> (3) Whenever used by a party about to be injured, or by another aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

As stated in the *Peasley* case this statute is ambiguous. The statute does not affirmatively state that the use of, or attempt or offer to use force shall be unlawful in all other circumstances. It is only by inference that a court could adopt this tentative corollary. *Peasley*, at page 507. Such an inference would be contrary to the common law and the rule of lenity in criminal cases. Fundamental fairness requires. that penal statutes be literally and strictly construed in favor of an accused, although a possible but strained interpretation in favor of the State might be found. *State vs. Hornaday*, 105 Wn. 2d 120, 713 P. 2d 71 (1986). The "rule of lenity" requires that in a criminal case any ambiguity in a statute must be resolved in favor of a defendant. *State vs. Martin*, 102 Wn. 2d 300, 684 P. 2d 1290 (1984). Where two possible constructions of a criminal statute are permissible, the "rule of lenity" requires a supreme court to construe the statutes strictly against the State in favor of the accused. *State vs. Gore*, 101 Wn. 2d 481, 681 P. 2d 227 (1984).

The definition of malice found in the criminal code, is not clear as to what context it should be used. RCW 9A.04.110 effective on the date of the alleged crime in this case, read as follows:

> In this title unless a different meaning plainly is required:
>
> (12) "Malice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

This definition should be confined to definitions of crimes, and has no applicability to the fact situation in this case. It is not clear whether criminal trespass comes within the definition of malice as above stated. RCW 9A.52.080 defines criminal trespass as:

> (1) A person is guilty of criminal trespass in the second degree if he knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree.

RCW 9A.52.010 defines premises as:

> "Premises" includes any building, dwelling, structure used for commercial agriculture, or any real property.

And the words "enters or remains unlawfully" is defined in RCW 9A.52.010(3) as follows:

> A person "enters or remains unlawfully" in or upon premises when he is not then licensed,

invited, or otherwise privileged to so enter or remain.

Logically a person should have a right to use reasonably [sic] force to prevent a criminal trespass. If this is so, then the definition of criminal trespass should be within the definition of malicious trespass. At any rate the legislature has confused the issue as to when, and when not, a property owner has a right to use force to protect his right of exclusive possession of his property. Under this state of confusion of the law how can anyone know what their rights are.

Instruct [sic] number 14 prevented defendants' counsel from effectively arguing that the defendants had a right to use reasonable force to exclude the newsmen from trespassing on their property, and to deprive them of the fruits of their violation of the defendants privacy, to wit: the film. If malice had to be defined in the context of this case, the instruction submitted by the defendants which follows should have been given:

> Malice and maliciously mean an evil intent, wish, design to vex, annoy, or injure another person.
>
> Malice may be inferred from an act done in willful disregard or the rights of another.
>
> A person is guilty of malicious trespass if he knowingly enters or remains unlawfully in or upon the premises of another.
>
> A person is unlawfully on the premises of another upon entry, unless that person reasonably believed the owner of the premises would have licensed him to enter or remain.

However it is submitted that no instruction on malice should have been given. By giving such an instruction on malice, defendants were deprived of due process and a fair trial.

The court should have given the following instruction which was rejected by the court, to wit:

> The use, or attempt or offer to use force upon or toward another person is not unlawful in the following cases:
>
> Whenever reasonable force is used to eject a trespasser from a person's property, or to protect a person's right of privacy. TR 237.

According to the Court of Appeals a person could not use reasonable force against a person committing criminal trespass unless that person also had a malicious intent as set forth in court's instruction number 14.

The trial court did not correctly define "criminal assault" in instruction 8. Under instruction number 8, a person could be guilty of a crime if he touched somebody on the shoulder to get the person's attention so he could ask for directions. The problem with instruction number 8 is, that it is incomplete and inaccurate. The first paragraph obviously would be an unreasonable exercise of the police power. *State vs. Spino*, 671 Wn. 2d 246, 377 P. 2d 868 (1963).

Even the second paragraph of instruction number 8 would be an incorrect statement of the law. The problem with that instruction is that it does not require criminal intent.

Also instructions number 11 and 12 which were the elements instructions of simple assault were not complete. These instructions did not define, or include the element of criminal intent or unlawful force.

Criminal intent is an element of simple assault. *State vs. Jones*, 34 Wn. App. 848, 664 P. 2d 12 (1983).

An act cannot be considered a battery unless the actor intended to cause a harmful or offensive contact with another person. *O'Donaghue vs. Riggs*, 73 Wn. 2d 814, 440 P. 2d 823 (1968).

The instructions in the case against the defendants allowed the jury to convict them of assault without criminal intent.

Instruction number 8 does not define what unlawful force is, nor does it accurately point out that a person has to intend to cause a harmful or offensive contact with another person, or to do an intentional act with the intention to create a reasonable apprehension of fear of bodily injury even if the actor did not actually intend to inflict bodily injury.

The court further committed error when it refused to give the instructions proposed by the defendant which read as follows:

> An assault is an act with unlawful force done with an intent to commit a battery against another person. An act cannot be considered a battery, unless the actor intended to cause a harmful or offensive contact with another person.
>
> An assault is also an act done with an intent, or design to create in the victim's mind a

reasonable apprehension of harm, whether or not such harm was actually intended. TR 322-23.

In *State vs. Acosta*, 101 Wn. 2d 612, 683 P. 2d 1069 (1984), the court made it clear that the long-standing rule in Washington is that a criminal assault requires unlawful force. *State vs. Norby*, 20 Wn. App. 378, 579 P. 2d 1358 (1978).

Defendants concede that if the State's theory was that if the defendants' intent was to create a reasonable apprehension of fear of bodily harm in the victim's mind rather than to inflict actual bodily injury, assault instructions need not include the element of an attempted battery. However, in this case the instructions presented two theories of liability, both theories of which are instructed incorrectly. The first part of instruction 8 given by the court allows a conviction of assault without requiring the element of unlawful force. The second instruction is contrary to the law in that the State is relieved from proving that the defendants acted with an intent or design to create in the victim's mind a reasonable apprehension of harm. Instruction number 8 only requires that there be an intentional act, which creates in another a reasonable apprehension and fear of bodily injury without specifying the act must be done with an intent or design to create that apprehension in the mind of a victim.

It is admitted that there are two concepts of assault where a battery is not committed. One concept is that an assault is an attempt to commit a battery. The second concept is that an assault is "committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting

that harm." As stated in *State vs. Krup*, 36 Wn. App. 454, 458, 676 P. 2d 507 (1984):

> Although Krup's criminal assault charge falls in this second category, the State is not relieved from proving Krup acted with an intent or design to create in his victim's mind a reasonable apprehension of harm; negligence alone is insufficient.

The court's instruction 8 prevents a defendant from effectively arguing to a jury that he had no criminal intent and was merely acting in a reasonable manner to protect his rights.

Due process requires that each element of the crime must be proved beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 25 L. Ed.2d 368, 90 S. Ct. 1068 (1970); *State vs. Shipp*, 93 Wn. 2d 510, 610 P. 2d 1322 (1980); RCW 9A.04.100. This court and the courts of appeal have made conflicting rulings regarding the guidelines for instructions. In *State vs. Allen*, 101 Wn. 2d 355, 678 P. 2d 798 (1984), the court held that it is clear that the trial court must instruct a jury on every element of the crime. Failure to inform the jury that there is an intent element is thus a "fatal defect" requiring reversal. The court went on to state:

> It is less clear whether the jury must be further instructed as to a statutory definition of an element of the crime. The cases generally hold that trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of common understanding.

The word "assault" is no longer a word of common understanding, particularly in view of instructions like instruction number 8, and WPIC 35.50. The intent element should have been included in the elements instruction, and also in the definition of the crime. The court should also provide guidelines regarding the 1975 legislature revisions of the State's criminal law. 1st Ex. Sess. 1975, Ch. 260, RCW 9A.

The legislature in that revision provided that the provisions in 9A.04 thru 9A.20 applied to Title 9A and to all other statutes defining a crime. RCW 9A.04.010(2); RCW 9A.04.090.

The 1975 revision of the criminal law did away with strict liability and liability without fault offenses unless specifically stated. RCW 9A.04.020(1)(b) states:

> The general purposes of the provisions governing the definition of offenses are:
>
> (b) To safeguard conduct that is without culpability from condemnation as criminal.

This legislation does away with the difficult necessity of categorizing an act as to whether it is mala per se or mala prohibita. This should be made clear in court decisions.

An assault requires unlawful force. Instruction number 13 improperly defined the circumstances under which property owners may use reasonable force.

First, instruction number 14 was an incorrect definition of "malicious trespass." Second, instruction number 13 did not tell the jury that a person had a right to use reasonable force to protect his right of privacy as well as

his right to exclusive possession of his property. It is conceded by petitioners that this court has not yet addressed the question of lawful force in protecting one's right of privacy, but it should be addressed. Third, defendants had a right to use reasonable force against any trespasses, not just a malicious trespasser.

The court should have either given the following instruction proposed by defendants or at least made it clear that the news media has no greater right than any other person or entity.

Proposed Instruction:

> You are instructed that members of the news media have no greater right to trespass on private property for the purpose of taking news pictures without the permission of the owner. Such action by the news media is an invasion of a person's right to privacy.
>
> The use, attempt, or offer to use force upon or toward another person is not unlawful in the following cases:
>
> Whenever reasonable force is used to eject a trespasser from his property or to protect a right of privacy.

Even if the parties do not propose proper instructions, a judge has an obligation to see that a jury is properly instructed so that defendants can obtain a fair trial. A judge is charged by law and conscious with a fundamental duty of seeing that truth is established and justice done, under the statutes and rules of law. *Talley vs. Fournier*, 3 Wn. App. 808, 479 P. 2d 96 (1970). In *State vs. Johnson*, 77 Wn. 2d 423, 462 P. 2d 933 (1969) the court also

indicated that the judge has a duty to conduct a trial fairly, expeditiously and impartially.

Defendants were entitled to have instructions upon their theory of the case because there was evidence to support that theory. *State vs. Theroff*, 95 Wn. 2d 385, 622 P. 2d 1240 (1980).

Under Art. 1 § 7 of the Washington State Constitution, no person shall be disturbed in his private affairs, or his home invaded without authority of law. Our court has determined that a person has a protectable interest in privacy. *Mark vs. Seattle Times*, 96 Wn. 2d 473, 635 P. 2d 1081 (1981).

The press has no right to trespass on another's property, or to invade that person's privacy. Where private property is not ordinarily held open to the public, access to it for the purpose of exercising first amendment rights may be denied all together. *Sutherland vs. South Center Shopping*, 3 Wn. App. 833, 478 P. 2d 792 (1970). *Rhinehart vs. Seattle Times*, 98 Wn. 2d 226, 654 P. 2d 673 (1982). Proposed instructions regarding these issues were rejected by the trial court.

Failure to give clear instructions regarding the limitation on the rights of news people deprived the defendants of a fair trial. It was important to define the rights of privacy in the instructions because the crime of Coercion can only be committed if a person is induced to engage in conduct which he has a legal right to abstain from. Certainly a person cannot abstain from giving up the fruits of his invasion of a person's privacy, or of his trespass on their property. See also *Anderson vs. WROC-TV*, 441 Nys.2d [sic] 220 (1981); *Brush vs. Pennsylvania*

State University, 414 At1.2d 48; *People vs. Weeks,* 591 P. 2d 91 (Colo.). Also see *Sunnyside vs. Lopez,* 50 Wn. App. 786, 751 P. 2d 313 (1988); *Prahl vs. Brosamle,* 292 NW.2d 768 (1980): *Stahl vs. State,* 665 P. 2d 839.

In *Beard vs. Aczona Inc.,* 517 F.2d 128 (1981), the court discussed the right of privacy, and concluded that whether information gained by reason of intrusion into plaintiff's physical solitude or seclusion was ever publicized is irrelevant to the intrusion form of invasion of privacy.

It is a violation of due process, therefore a violation of the right to a fair trial, if the court in instructing the jury as to the statutory definition of the crime with which a defendant stands charged fails to set forth all of the pertinent elements contained in the statute. *State vs. Bailey,* 114 Wn. 2d 340, 787 P. 2d 1378 (1990).

In *State vs. Emmanuel,* 42 Wn. 2d 799, 259 P. 2d 845 (1953), on pages 820 and 821, the court adopted the following quotation from a Florida case, to wit:

> Where the trial court attempts to define the offense, for the commission of which an accused is being tried, it is the duty of the court to instruct the jury as to each and every essential element of the offense charged and a charge attempting to define the offense which does not cover material elements of the offense is necessarily misleading and prejudicial to the accused. It is equivalent to directing the jury that it is not necessary for the state to prove any elements of the offense except those included in the definition by the court.

> To have the advantage of this right it is not necessary for the accused to request special charges covering the elements of the offense which have not been covered by the charge embraced in the definition given to the jury by the court of its own volition because, . . . it is the duty of the court to define to the jury the elements of the offense with which the accused is charged and such definition must be at least not misleading.

Issue No. 2:

Did irrelevant testimony allowed by the trial court prejudice defendants' rights to a fair trial?

The overall action of the trial court judge, regarding the instructions, and the evidence, served to deny the defendants a fair trial, which is the cornerstone of due process.

One of the glaring errors was allowing the testimony of retired Sgt. Robertson, details of which were discussed in the Statement of Facts.

Despite the objection of defense counsel Sgt. Robertson was allowed to testify. It was obvious the only reason for this testimony was its prejudicial effect. It certainly was not material as to any issue in this case. Even if it had

* * *

of. They obviously had knowledge that the defendants had been charged with a crime. The video tape had sound. The video tape could have shown the complaining witnesses taking pictures of the fire, and of their trespass

on defendants' property. The police made no effort to obtain this film, or to protect it from destruction. *State vs. Laureano*, 101 Wn. 2d 745, 682 P. 2d 889 (1984).

Issue No. 4:

Did the charging documents in this case meet the "essential elements" constitutional rule?

A copy of the complaint charging the defendants with Assault and Coercion is contained in the appendix to this petition. The complaint in this case regarding Simple Assault is constitutionally defective. It violates the "essential elements" rule by leaving out the element of criminal intent. *State vs. Leach*, 113 Wn. 2d 679 (1989) accord *State vs. Hein*, 115 Wn. 2d 555.

The charging document also does not meet due process because of "vagueness." A demand for a bill of particulars was made by the defendants prior to trial, and this was not complied with. Counsel for the defendants unfortunately failed to include this in the clerk's papers, however a copy of the demand for a bill of particulars that was originally filed in the trial court is contained in the appendix.

The right to be informed of the nature and cause of the accusation is guaranteed by the Sixth Amendment, and made applicable to the states by the Fourteenth Amendment, *In Re Gault*, 387 U.S. 1, 60, 18 L. Ed.2d 527, 87 S. Ct. 1428 (1967), and Art. 1 § 22 of the State Constitution.

At the present time there is a conflict between the Court of Appeals decision regarding the "essential elements" rule in a charge of simple assault. In *State vs. Robinson*, 58 Wn. App. 599, 794 P. 2d 1293 (1990). Division I of the Court of Appeals held that where there is a charge of simple assault, the charge must contain the element of intent.

There is also a conflict regarding the standard of review when a complaint is challenged for the first time on appeal. Some courts have applied a stricter standard of review when the information is challenged for the first time on appeal. *State vs. Sly*, 58 Wn. App. 740, 745-46, declined to apply the stricter standard of review under those circumstances. It is obvious that the Supreme Court has to provide further guidance regarding both of these issues.

Issue No. 5:

Did the court's failure to comply with the court rule requiring a list of witnesses to be furnished to the defendants prejudice their right to a fair trial?

This case occurred in 1985. The rule applicable at the time of the trial was in 1987. See Justice Court Criminal Rule 3.10 (JCrR 3.10). It is a mandatory rule. There was no limitation contained in the rules as to the sanctions. JCrR 3.10 is very similar to RCW 10.37.030 which was the

* * *

APPENDIX I

GRAYS HARBOR COUNTY DISTRICT COURT,
DEPARTMENT I
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff vs. NICHOLAS KOSTELLO, and PATRICK KOSTELLO, Defendants.	NO. P2439 NOTICE OF APPEARANCE AND DEMAND FOR DISCOVERY

TO: The Clerk of the Court:
AND TO: Deputy Prosecuting Attorney

PLEASE TAKE NOTICE that JACK L. BURTCH hereby appears for the defendants and makes the following demand for discovery:

1. The name, addresses and telephone numbers of all persons the Prosecuting Attorney may call as witnesses at the time of hearing or trial, together with copies of any notes, written or recorded statements, the substance of any oral statements made by any of those witnesses and a summary of their testimony to be offered at hearing or trial. Please file with the court the names of the witness in accordance with JCrR 3.10a.

2. Any statements, written or oral, made by the defendant or by a codefendant.

3. A list of all physical items of evidence, together with copies thereof if possible.

4. Any record of convictions of the defendant and any witnesses.

5. Any evidence tending to exculpate the defendant.

6. The defendant hereby requests a bill of particulars pursuant to JCrR 2.04(b).

You are further hereby notified that failure to comply with these requests will result in the defendant moving for appropriate relief from the court.

DATED: April 9, 1986.

/s/ Jack L. Burtch
JACK L. BURTCH
Attorney for Defendants

CERTIFICATE

I hereby certify that I mailed a copy of the foregoing Notice of Appearance and Demand for Discovery to MICHAEL SMITH, Deputy Prosecuting Attorney, Office of the Prosecuting Attorney, Courthouse, Montesano, Washington, 98563 postage pre-paid on April 14, 1986.

/s/ Jack L. Burtch
JACK L. BURTCH

APPENDIX J

GRAYS HARBOR COUNTY DISTRICT COURT

STATE OF WASHINGTON, Plaintiff vs. NICHOLAS JOHN KOSTELLO, DOB: 5/7/59, GENE PATRICK KOSTELLO, Age 24 Defendant(s).	)	NO. P2439 **CRIMINAL COMPLAINT** (Filed Feb. 21, 1986)

I. COMPLAINT

STATE OF WASHINGTON)
) ss
GRAYS HARBOR COUNTY)

The undersigned, under penalty of perjury, certifies the following:

1.1 I am a Deputy Prosecuting Attorney for Grays Harbor County.

1.2 That I have reasonable grounds to believe, and do believe, the defendant(s) committed the crime(s) of SIMPLE ASSAULT, and COERCION (TWO COUNTS), as follows:

COUNT I

On or about December 17, 1985, in Grays Harbor County, Washington, Nicholas John Kostello and Gene Patrick Kostello did assault Greg Lehman, a human being;

CONTRARY to RCW 9A.36.040(1).

COUNT II

On or about December 17, 1985, in Grays Harbor County, Washington, Nicholas John Kostello and Gene Patrick Kostello by use of a threat, did compel or induce Greg Lehman to engage in conduct which such person had a legal right from which to abstain, or abstain from conduct in which such person had a right to engage;

CONTRARY TO RCW 9A.36.070(1).

COUNT III

On or about December 17, 1985, in Grays Harbor County, Washington, Nicholas John Kostello and Gene Patrick Kostello by use of a threat, did compel or induce Mike Boss to engage in conduct which such person had a legal right from which to abstain, or abstain from conduct in which such person had a legal right to engage;

CONTRARY to RCW 9A.36.070(1)

/s/ Dave Rovang
Deputy Prosecuting
Attorney

WDR/smr

APPENDIX K

SUPERIOR COURT OF WASHINGTON
FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON, Plaintiff vs. NICHOLAS JOHN KOSTELLO, and GENE PATRICK KOSTELLO, Defendants.	89 5302 NO. 87-1-316-0 DECISION AND ORDER OF THE COURT

This matter come before the court on appeal from the Grays Harbor County District Court, Department No. 1, by virtue of the rules for appeal of decision of courts of limited jurisdiction contained in rules designated RALJ. This decision and order is in conformance with RALJ 9.1.

As the result of a jury trial, the defendant Nicholas John Kostello was found not guilty of the crime of Simple Assault, as charged in Count I, but was found guilty of the crime of Coercion as charged in Count [sic] II and III. The defendant Gene Patrick Kostello was found not guilty of the crime of Coercion as charged in Count III, but was found guilty of the crime of Coercion as charged in Count II and was found guilty of the crime of Simple Assault as charged in Count I.

This appeal followed.

The following decision of this court is based upon the transcript of the trial, the exhibits at trial, and the files and records of the District Court.

A careful analysis of the proceedings in the District Court convinces this court that there is insufficient proof in the record to prove the charges against the defendants, and that the instructions given were incorrect and incomplete.

The news media has no right, under the First Amendment of the United States Constitution, to trespass on private property, whether or not the event is news worthy.

The complaining witnesses were newspaper reporters who trespassed on defendants' property in an area that was private and secluded from the public road for the purpose of taking pictures of a burning shed on the defendants' property, without permission of the owners, and over their express objections.

The defendants, as residents of the property owned by their parents, had an absolute right not to be disturbed in their privacy by the complaining witnesses. An instruction to that effect should have been given by the court, whether or not it was requested by any parties.

The acts of the defendants in removing the complaining witnesses from the defendants' property and confiscating the film of the complaining witnesses was, as a matter of law, reasonable and proper and the case against defendants should have been dismissed with prejudice. Instruction No. 15 given by the trial court was incomplete, and Instruction No. 13 is an incorrect statement of law because the trespass need not be malicious for an owner or resident to have the legal right to use reasonable force to remove or prevent the trespass or protect their right of privacy.

An instruction should have been given by the trial court, regardless of whether requested, that the right of privacy is a subdivision of trespass, and that the same protections exist as to each.

The court does not find any fault with Instructions No. 8 or 9 given by the trial court.

The court's decision is basically divided into three parts: (1) The case should have been dismissed, because the force used was not unreasonable; (2) The coercion case should have been dismissed because there was nothing unreasonable about what the defendants did when getting possession of the film; and (3) At the very least the case should have be [sic] remanded for a new trial on the basis of faulty instructions as above specified.

Based upon the following decision, the court hereby reverses the verdict of the jury, and dismisses all charges against defendants with prejudice, and directs the District Court to correct their records accordingly.

Dated: November 9, 1989.

/s/ John H. Kirkwood
JUDGE PRO TEM.

Presented by:
Jack L. Burtch
JACK L. BURTCH
Attorney for Defendants

APPENDIX L

GRAYS HARBOR COUNTY DISTRICT COURT, DEPT. 1

STATE OF WASHINGTON,
Plaintiff
vs.
GENE PATRICK KOSTELLO,
and
NICHOLAS JOHN KOSTELLO,
Defendants.

Case No. P-2439

COURT'S INSTRUCTIONS TO THE JURY

/s/ Stephen E. Brown
STEPHEN E. BROWN, JUDGE

Date given to jury: 9-23-87.

INSTRUCTION NO. 1

It is your duty to determine the facts in this case from the evidence produced in court. It also is your duty to accept the law from the Court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

The complaint in this case is only an accusation against the defendant which informs the defendant of the charge. You are not to consider the filing of the complaint, or its content, as proof of the matters charged.

The evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence which either was not admitted or which was stricken by the Court.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by the parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole and exclusive judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness or unreasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

Counsel's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any statement, remark or argument which is not supported by the evidence or law as given to you by

the Court. The attorneys have the right and the duty to make any objections which they deem appropriate. Such objections should not influence you, and you should make no presumption because of objections by counsel.

The law does not permit me to comment on the evidence in any way and I have not intentionally done so. If it appears to you that I have so commented, during either the trial or the giving of these instructions, you must disregard such comment entirely.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict.

INSTRUCTION NO. 2

You are instructed that the law presumes a defendant to be innocent until proven guilty beyond a reasonable doubt. This presumption is not a mere matter of form but it is a substantial part of the law of the land, and it continues throughout the entire trial and until you have found that this presumption has been overcome by the evidence beyond a reasonable doubt.

Reasonable doubt may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence.

If, after such consideration, you have an abiding belief in the truth of the charge, then you are satisfied beyond a reasonable doubt. On the other hand if you do

not have such an abiding belief in the truth of the charge you must find the defendant not guilty.

INSTRUCTION NO. 3

In your deliberations you are not to be concerned with the punishment that may follow a conviction. Your sole duty is to decide the questions of fact as to whether a defendant is guilty or innocent. The fact that punishment may follow a conviction should influence you only to the extent that it will make you careful in your deliberations.

INSTRUCTION NO. 4

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias, or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

INSTRUCTION NO. 5

The defendants, Nicholas John Kostello and Gene Patrick Kostello, are charged by Criminal Complaint filed by the State of Washington with the crimes of Simple Assault and Coercion alleged to have been committed as follows:

> That they, Nicholas John Kostello and Gene Patrick Kostello, in Grays Harbor County, Washington, on or about December 17, 1985, did assault another human being, to-wit: Greg Lehman.
>
> On or about December 17, 1985, in Grays Harbor County, Washington, Nicholas John Kostello and Gene Patrick Kostello by use of a threat, did compel or induce Greg Lehman to engage in conduct which such person had a legal right from which to abstain, or abstain from conduct in which such person had a right to engage.
>
> On or about December 17, 1985, in Grays Harbor County, Washington, Nicholas John Kostello and Gene Patrick Kostello by use of a threat, did compel or induce Mike Boss to engage in conduct which such person had a legal right from which to abstain, or abstain from conduct in which such person had a legal right to engage.

To this Complaint the defendant has entered a plea of not guilty which plea puts in issue every material allegation contained therein.

INSTRUCTION NO. 6

A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant on each crime charged against that defendant separately as if it were a separate trial. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

INSTRUCTION NO. 7

A person commits the crime of Simple Assault when he assaults another person.

A person commits the crime of Coercion if by use of a threat he compels or induces a person to engage in conduct which the latter has a legal right to abstain from.

INSTRUCTION NO. 8

As [sic] assault is an intentional touching or striking of the person or body of another, regardless of whether any actual physical harm is done to the other person.

An assault is also an intentional act, with unlawful force, which creates in another a reasonable apprehension and fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

INSTRUCTION NO. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 10

Threat means to communicate, directly or indirectly, the intent:

To immediately use force against any person who is present at the time; or

To cause bodily injury in the future to the person threatened or to any other person; or

To cause physical damage to the property of a person other than the actor; or

To subject a person threatened or any other person to physical confinement or restraint.

INSTRUCTION NO. 11

To convict the defendant, Nicholas John Kostello, of the crime of Simple Assault as charged in Count I of the Criminal Complaint filed by the State of Washington, each of the following elements must be proved beyond a reasonable doubt:

(1) That on or about December 17, 1985, Nicholas John Kostello, assaulted Greg Lehman; and

(2) That the acts occurred in Grays Harbor County, Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt then it will be your duty to return a verdict of guilty as to the charge of Simple Assault.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements then it will be your duty to return a verdict of not guilty as to the charge of Simple Assault.

INSTRUCTION NO. 12

To convict the defendant, Gene Patrick Kostello, of the crime of Simple Assault as charged in Count I of the Criminal Complaint filed by the State of Washington, each of the following elements must be proved beyond a reasonable doubt:

(1) That on or about December 17, 1985, Gene Patrick Kostello, assaulted Greg Lehman; and

(2) That the acts occurred in Grays Harbor County, Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt then it will be your duty to return a verdict of guilty as to the charge of Simple Assault.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements then it will be your duty to return a verdict of not guilty as to the charge of Simple Assault.

INSTRUCTION NO. 13

It is a defense to a charge of Simple Assault that the force used was lawful as defined in this instruction.

The use of, or offer to use, force upon or toward the person of another is lawful when used or offered in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession and when the force is not more than is necessary.

The person using or offering to use the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

The State has the burden of proving beyond a reasonable doubt that the force used or offered to be used by the defendant was not lawful.

INSTRUCTION NO. 14

Malice and maliciously mean an evil intent, wish, or design to vex, annoy, or injure another person.

Malice may be inferred from an act done in wilful disregard of the rights of another.

INSTRUCTION NO. 15

An owner of real property has a right to have exclusive possession of that property and that someone who comes on that property uninvited has a duty to leave when requested to do so by the owner.

INSTRUCTION NO. 16

To convict the defendant, Nicholas John Kostello, of the crime of Coercion as charged in Count II of the Criminal Complaint filed by the State of Washington, each of the following elements must be proved beyond a reasonable doubt:

(1) That the defendant, Nicholas John Kostello, on or about December 17, 1985, compelled or induced Greg Lehman to engage in conduct which Greg Lehman had a legal right to abstain from;

(2) That the above acts were done by use of a threat;

(3) That the acts occurred in Grays Harbor County, Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt then it will be your duty to return a verdict of guilty as to the charge of Coercion.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements then it will be your duty to return a verdict of not guilty as to the charge of Coercion.

INSTRUCTION NO. 17

To convict the defendant, Gene Patrick Kostello, of the crime of Coercion as charged in Count II of the Criminal Complaint filed by the State of Washington, each of the following elements must be proved beyond a reasonable doubt:

(1) That the defendant, Gene Patrick Kostello, on or about December 17, 1985, compelled or induced Greg Lehman to engage in conduct which Greg Lehman had a legal right to abstain from;

(2) That the above acts were done by use of a threat;

(3) That the acts occurred in Grays Harbor County, Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt

then it will be your duty to return a verdict of guilty as to the charge of Coercion.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements then it will be your duty to return a verdict of not guilty as to the charge of Coercion.

INSTRUCTION NO. 18

To convict the defendant, Nicholas John Kostello, of the crime of Coercion as charged in Count III of the Criminal Complaint filed by the State of Washington, each of the following elements must be proved beyond a reasonable doubt:

(1) That the defendant, Nicholas John Kostello, on or about December 17, 1985, compelled or induced Mike Boss to engage in conduct which Mike Boss had a legal right to abstain from;

(2) That the above acts were done by use of a threat;

(3) That the acts occurred in Grays Harbor County, Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt then it will be your duty to return a verdict of guilty as to the charge of Coercion.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these

elements then it will be your duty to return a verdict of not guilty as to the charge of Coercion.

INSTRUCTION NO. 19

To convict the defendant, Gene Patrick Kostello, of the crime of Coercion as charged in Count III of the Criminal Complaint filed by the State of Washington, each of the following elements must be proved beyond a reasonable doubt:

(1) That the defendant, Gene Patrick Kostello, on or about December 17, 1985, compelled or induced Mike Boss to engage in conduct which Mike Boss had a legal right to abstain from;

(2) That the above acts were done by use of a threat;

(3) That the acts occurred in Grays Harbor County, Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt then it will be your duty to return a verdict of guilty as to the charge of Coercion.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements then it will be your duty to return a verdict of not guilty as to the charge of Coercion.

INSTRUCTION NO. 20

A person is an accomplice in the commission of a crime, if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime.

INSTRUCTION NO. 21

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a foreman to act as chairman. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed and that every juror has a chance to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence these instructions and the verdict forms.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty," according to the decision you reach.

Since this is a criminal case, all six of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The foreman will sign them and notify the clerk who will conduct you into court to declare your verdict.